MOTION FILED
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No. 86-108

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

GARY HILTON, et al.,

Petitioner,

—v.—

DANA BRAUNSKILL,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MOTION FOR LEAVE TO FILE AND BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION, AMERICAN CIVIL LIBERTIES UNION OF NEW JERSEY, THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, AND THE ASSOCIATION OF CRIMINAL DEFENSE LAWYERS OF NEW JERSEY

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MOTION FOR LEAVE TO FILE A BRIEF AS AMICI CURIAE

The American Civil Liberties Union, the American Civil Liberties Union of New Jersey, the National Association of Criminal Defense Lawyers and the Association of Criminal Defense Lawyers of New Jersey hereby respectfully move for leave to file a brief annexed hereto as Amici Curiae in this case. Respondent has consented to the filing of this amicus brief. Petitioners have not responded to Amici's request for consent.

The American Civil Liberties Union is a nationwide non-partisan organization of over 250,000 members; the ACLU of New Jersey is one of its state affiliates. The ACLU has been particularly active in preserving and defending the procedural vehicle of federal habeas corpus and the full reach

of the Bill of Rights as applied to those accused of crime.

The National Association of Criminal Defense Lawyers is a nationwide organization consisting of 4200 lawyers primarily engaged in the defense of criminal defendants in both the state and federal courts. It has an interest in protecting the basic procedural and constitutional rights of the clients of its members which are implicated by the instant case.

The Association of Criminal Defense Lawyers of New Jersey (ACDL-NJ) is a statewide organization of criminal defense lawyers (both private bar and public defenders) who practice in both the state and federal courts. Founded in 1985 "to protect and insure by rule of law those individual rights guaranteed by the New Jersey and the United States Constitutions," ACDL-NJ has participated as amicus in the New Jersey

Supreme Court. Beyond its general interest in the protection of individual rights within the state and federal system, ACDL-NJ is particularly concerned about the impact of this habeas decision on the New Jersey system of criminal justice.

It is therefore respectfully requested that the Amici be granted leave to file this brief amicus curiae in the hope that it will assist the Court's resolution of this case, which raises important questions dealing with federal habeas corpus and the right to release of unconstitutionally convicted state prisoners.

Dated: New York, N.Y.
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INTEREST OF AMICI

The Statement of the interest of amici is contained in the Motion for Leave to file a Brief as Amici Curiae.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case implicates important principles of federalism in the application of the criminal law, an issue that has concerned this Court to a greater and greater degree in recent years. The rule established by the Third Circuit in Carter v. Rafferty, 781 F.2d 993 (3d Cir. 1986), and applied in this case, has accomodated the maximum state interest in preserving and applying its own procedural rules relating to the release on bail of a state prisoner whose conviction has been overturned on federal habeas corpus. It permits the most extreme deference to the bail and release policies of a state by requiring the state to return to its own courts to apply its own detention rules to the state prisoner while the case is on appeal in the federal system. The Carter rule declares in effect that, since the effect of

the grant of the writ is to wipe out the force of the original conviction, a state's policies on bail and release of a defendant or prisoner must be applied when dealing with a successful habeas corpus petitioner in the same way and to the same extent that the state courts would treat an indicted but not convicted defendant.

However, the New Jersey Attorney General and the Solicitor General have urged a rule upon this Court that would turn federalism on its head and impose a uniform federal requirement on the states that might conflict with important state principles and rules to the contrary. Thus, although the State of New Jersey has declared as a matter of state policy that the potential dangerousness of an accused defendant cannot be the basis for incarcerating him before trial, see N.J. Ct. R. 3:26-1(a) and State v. Johnson, 61 N.J.

351, 160 (1972) 1. the petitioners here insist that that state policy should be ignored when the same state prisoner has successfully overturned his conviction on constitutional grounds in federal court. Under their theory, the federal courts dealing on federal habeas corpus with New Jersey's incarceration of its state prisoners would consider -- presumably as a decisive factor -- that which the New Jersey courts cannot consider as a basis for imprisoning a defendant pending his conviction in the state system.

In the name of federalism, the petitioners and the United States as amicus

1. It should be noted that New Jersey is itself debating the issue of whether the safety of the community should be a factor in determining the pre-trial release of an accused. A recent bill, New Jersey Assembly Bill, A. 2113, Bail Act of 1986, would allow considerations of dangerousness to be taken into account when setting bail. If the bill passes, then obviously under the Carter rule, the state courts would then be permitted to consider that factor when dealing with a successful habeas petitioner.

would ignore state rules and trammel state policies, all in favor of some elusive uniformity that itself may violate the Constitution, see discussion below of United States v. Salerno, 794 F.2d 64 (2d Cir. 1986) cert. granted 55 U.S.L.W. 3315 (November 4, 1986). But this approach would seem to show a concern with, and be supportive of, federalism only when the state rule is more restrictive of a defendant's rights than the federal rule would be; when a state's rules or policies are more protective or solicitous of the rights of an accused, then federalism would be ignored and a uniform federal rule established at a more restrictive level than that which the state would impose. Because the rule urged by the Petitioner and the Solicitor General is counter to this Court's continued concern that federal courts should not oust the states' rightful application of their own procedural rules in the criminal

law, particularly on federal habeas corpus (exemplified most forcefully in Wainwright v. Sykes, 433 U.S. 72 (1977)), their arguments should be rejected and the decision below should be affirmed.

ARGUMENT

I. FEDERAL COURTS SHOULD NOT CONSIDER DANGEROUSNESS AS A BASIS FOR NOT RELEASING A SUCCESSFUL HABEAS CORPUS PETITIONER UNLESS THE STATE COURTS WOULD REFUSE BAIL ON THAT BASIS TO AN INDICTED BUT NOT YET CONVICTED DEFENDANT

A. A Successful Habeas Corpus Petitioner in the District Court Should be Treated as an Indicted But Not Yet Convicted State Defendant.

Crucial to the state's position on this appeal is the astonishing argument that a prisoner who has been successful on a habeas corpus petition at the district court level is different from a person indicted but not yet tried in the state courts, a position that the Carter court explicitly rejected,

781 F. 2d at 998. That argument ignores the effect of the federal court ruling that constitutional error has occurred and that the individual has been deprived of his liberty without due process of law. To say that the ruling is "only" that of a district court judge which can be reversed on appeal is to ignore two basic tenets of our federal system: (1) the force and effect of the Supremacy Clause which declares that the Constitution is the supreme law of the land and state judges are bound thereby; and (2) the long established rule that "the federal judiciary is supreme in the exposition of the law of the Constitution." Cooper v. Aaron, 358 U.S. 1, 18 (1958). It follows that, unless and until its decision is reversed, the federal district court speaks for "the federal judiciary" whose interpretation of the Constitution must govern the case before it. And when it decides that a conviction

violated the Constitution, all state officials "are bound thereby."

That is certainly the philosophy behind the presumption in favor of release of a successful habeas corpus petitioner at the district court level which all parties acknowledge is mandated by Rule 23(c). The reason for such a presumption is that the decision declaring the conviction illegal and void under the Constitution must be given strong effect in the only way that matters to the successful litigant -- namely, by releasing him from his presumptively illegal and unconstitutional confinement. The assumption on which the rule is based is totally inconsistent with the state's assertion here that it is "only" the decision of a single judge which somehow does not matter and can be ignored until higher courts have spoken.

As the Carter court recognized, once the conviction is declared void by the district court, the status of the petitioner is precisely that of an indicted but not yet convicted defendant in the state system. A conviction obtained in violation of the Constitution "is not merely erroneous, but it is illegal and void, and cannot be a legal cause of imprisonment," Ex parte Siebold, 100 U.S. 371, 376-77 (1879).

B. The Effect of Salerno.

The preliminary issues raised on this appeal overlap those raised in United States v. Salerno, 794 F.2d 64 (2d Cir. 1986), cert. granted, 55 U.S.L.W. 3315(November 4,1986) which will be argued before this case is heard. If this Court affirms the Second Circuit decision and holds that the Bail Reform Act violates the Constitution insofar as it permits pretrial detention of a federal defendant on the ground that his release

would pose a danger to the community or any person, see Brief of Amici Curiae, American Civil Liberties Union, New York Civil Liberties Union, and Civil Liberties Union of Southern California, United States v. Salerno, No. 86-87, then that same holding would apply to a state prisoner whose conviction has been vacated on constitutional grounds on federal habeas corpus.

However, a holding in Salerno that the Bail Reform Act constitutionally permits preventive detention of federal defendants pending trial would not predetermine the issues in this case. Even if Congress might constitutionally impose a requirement that general dangerousness might be considered as a basis for detention of a federal defendant by a federal court, Congress has imposed no such requirement with respect to state prisoners coming into federal court on a habeas corpus petition. Indeed, as we

explain below, the only federal rule on the subject, Fed. R. App. P. 23(c), indicates that release should be the norm when a petition has been granted, unless some special factor counsels otherwise. And if the laws and policy of the state that secured the conviction and holds the defendant does not provide for -- or prohibits -- consideration of potential danger as a basis for incarceration, the constitutionality of the provisions of the federal Bail Reform Act certainly does not in any way require this Court to impose the same requirement on the States. Moreover, until Congress authorized preventive detention in the Bail Reform Act, the federal courts had never asserted any authority to detain individuals solely on the basis of dangerousness; thus, no power inheres in a federal court to impose any restraint on an individual it deems to be held unconstitutionally beyond that

authorized by Rule 23(c). Thus while a decision upholding the result below in Salerno would militate in favor of affirmance in this case as well, the reversal of Salerno would in no way effect the Third Circuit rule at issue here.

C. The Presumption in Favor of Release.

The various parties to this appeal agree on three basic propositions:

(1). Under Rule 23(c), it is presumed that a successful habeas corpus petitioner will be released pending any appeal in his case (Brief of Petitioners on the Merits at 17). See also United States ex rel. Thomas v. State of New Jersey, 472 F.2d 735, 743 (3d Cir. 1973)("...there is still a very strong presumption that a petitioner holding a final judgment that his detention is unlawful should not be left in state custody.")

(2). If the federal court believes that there is a significant risk of flight so

that the petitioner would not respond to federal court orders, release need not be required, Carter, 781 F.2d at 995.

(3). Following the grant of a writ vacating a conviction on constitutional grounds, as affirmed through the federal system, the state courts may impose whatever bail restrictions it normally imposes on persons indicted but not yet convicted of a crime.

What the Third Circuit has done in Carter and in this case is to advance the state court's power to act from the stage when all appeals have been completed to the stage where the district court has acted to grant the writ and the case is still on appeal. It did so in an effort to reconcile the heavy presumption in favor of release recognized by all courts (and acknowledged by the parties) in the light of the past history of the rule, already described in the other

briefs. And the Third Circuit also imposed this rule in light of its view that dangerousness is "traditionally [a] state concern[]," Carter, 781 F.2d at 998, that should be examined by the state courts in accordance with their usual procedures for dealing with indicted individuals.

The State of New Jersey, supported by the United States as amicus, seeks here to shirk the responsibility for its own criminal laws and policies to which the Court of Appeals deferred. Before this Court, the state urges a general federal rule that allows the federal courts to consider dangerousness regardless of the state rule in effect in the jurisdiction from which the writ was granted. That proposal has neither history nor logic to support it.

In the first place, the heavy presumption in favor of release of a successful habeas corpus applicant flows from

the very nature and purpose of the writ itself: "the protection of individuals against erosion of their right to be free from wrongful restraints upon their liberty," Jones v. Cunningham, 371 U.S. 236, 243 (1963). If a writ has been granted, that means that the petitioner has been imprisoned in violation of his constitutional rights. Every day that he remains imprisoned is a further illegal incarceration.

Secondly, the judgment of the district court that a constitutional error has occurred must be given appropriate recognition. Indeed in the overwhelming majority of cases, a district court decision on a state prisoner's habeas corpus petition is affirmed on appeal. See Table B-5, Annual Report of the Director of the Administrative Office of the U.S. Courts during the Twelve Month ended June 30, 1986 (entry on "private prisoner petitions," involving actions

brought both under Section 2254 and 42 U.S.C. Section 1983) 2.

These figures indicate that any rule that would denigrate or ignore the effect of a district court decision that constitutional error has occurred -- by refusing to release the prisoner based on the state's normal pretrial detention rules while the case is pending on appeal, on the theory that the state will be likely to obtain a reversal -- cannot be accepted. It would only seriously

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2.According to information provided to Amici on December 30, 1986 by the non-criminal branch of the Statistical Analysis and Reports Division, Administrative Office of the U.S. Courts, in fiscal year 1986 there were 992 state prisoner habeas cases decided on the merits in the Courts of Appeal; in only 154 of these cases was the district court determination reversed in whole; and in an additional 26 cases the district court decision was reversed in part. Thus in only 18.1% of the state prisoner habeas corpus petitions brought under Section 2254 was a district court decision reversed on appeal. The Administrative Office was unable to determine based on its statistics whether the rate of reversal on appeal is different when the writ was granted by the district court or when it was denied.

prejudice the successful petitioner by depriving him of his liberty for the period of time that the case is pending on appeal. There is no countervailing risk of prejudice to the state, for, to the extent that the state would otherwise be able to incarcerate an indicted individual pending trial, according to its own rules, those rules could be applied to the petitioner while his case is pending on appeal, as the Third Circuit has held. Indeed in this case, the Court of Appeals affirmed the grant of the writ on December 2, 1986. If the State's bland assertions -- which would be totally unprovable beforehand -- that it would be successful on appeal and the petitioner was dangerous had been accepted by the district court, then petitioner would have been imprisoned unnecessarily for an additional seven months for no purpose. Any rule that

leads to such a result leaves much to be desired.

Thirdly, there is a vast difference, on the one hand, in situations such as that involved here and in Carter, where genuine issues of guilt or innocence are presented, see Carter v. Rafferty, 621 F. Supp. 533 (D.N.J. 1985)) and the constitutional error is great and, on the other, situations such as that presented in Walberg v. Israel, 776 F.2d 134 (7th Cir. 1985), where the evidence of guilt was overwhelming and the petitioner offered to plead guilty while the case was pending in which case the motive to flee would be great and the Carter rule would justify restraint in such a case.

Fourthly, it is difficult to accept the state's position that it somehow faced with a Hobson's choice of foregoing its right to appeal the grant of a habeas petition if it wants to continue to incarcerate a state

prisoner. There is nothing in the Carter rule that creates such a dilemma. While an appeal is pending, the state must apply its own bail rules to the petitioner. Questions of release are totally seperate from questions of appeal and retrial, each of which must be considered in its own light. It is the state which improperly tries to combine the two.

In any event, it is difficult to see why the state is prejudiced when its own rules are being applied in its own state courts to its own state prisoners. If its own rules prohibit the consideration of dangerousness as a factor justifying restraint, then it certainly should not ask the federal courts to apply such a standard to state prisoners.

II. THE SOLICITOR GENERAL'S SUGGESTION THAT THE STAY PROVISIONS OF RULE 8 FED. R. APP. P. SHOULD APPLY MUST BE REJECTED SINCE A HABEAS CORPUS PETITION CANNOT BE TREATED THE SAME WAY AS A CIVIL APPEAL

The Solicitor General in his brief arrives through a different route than that taken by the state to the conclusion that potential dangerousness should be considered as a factor in the release of a habeas corpus petitioner. He arrives at that conclusion through the following argument: (1) a habeas corpus petition is a civil case; (2) in all civil cases, the order of a district court can be stayed pending appeal if a four-fold test -- likelihood of success, irreparable injury to moving party, injury to prevailing party and the public interest -- is met; (3) the public and the state have an interest in not releasing a potentially dangerous defendant and that factor must weigh heavily in not releasing a successful habeas petitioner.

Each part of the Solicitor General's argument is seriously flawed.

In the first place, habeas corpus may be a "civil" proceeding for some purposes, but this Court has made clear that the normal civil rules cannot be carried over carte blanche into the habeas area. See Harris v. Nelson, 394 U.S. 286, 294 (1969). Indeed Rule 11 of the Rules Governing Section 2254 Cases in the United States District Courts specifically notes that the Federal Rules of Civil Procedure may be applied to habeas corpus petitions "to the extent that they are not inconsistent with these rules" and only "when appropriate." By analogy, in applying the Rules of Appellate Procedure, where there is a specific rule, such as Fed. R. App. P. 23(c) dealing precisely with release of a successful habeas corpus petitioner while on appeal and creating a heavy presumption in favor of release, then the more general considerations of Rule 8, which apply to labor injunctions or commercial disputes and

similar cases, cannot be imported into habeas proceedings.

Secondly, even if some of the same Rule 8 factors could be applied in this situation, they cut against the Solicitor General's argument. In the first place, the statistics discussed above show that the probablity of district court decisions on habeas corpus being overturned on appeal is generally quite low -- only 18.1%. That militates against the establishment of any rule that would generally allow, or make easier, the continued incarceration of a successful habeas petitioner.

Thirdly, the state can hardly show that it will suffer irreperable injury when its own state rules on release of an indicted but not convicted defendant will be applied to a habeas petitioner. The State of New Jersey is asking for something "extra" which its own state courts would not grant it, namely,

incarceration of a prisoner based on dangerousness after his conviction has been overturned on constitutional grounds.

Fourthly, the injury to the prevailing party below -- the successful state prisoner -- is patent. He will be deprived of his constitutional right to liberty while the appeal is pending, an interest that the Solicitor General himself concedes should be "weighed heavily."

Finally the public interest requires that the state apply its own rules on the subject of release. If a state has decided as a matter of its own public policy that state courts should not consider dangerousness as a factor in deciding whether to release an accused defendant, there would seem to be no reason why that factor should be considered by the federal courts in holding a state

prisoner once the conviction has been overturned. 3.

CONCLUSION

For the reasons stated above, the decision below must be affirmed.

3.The Solicitor General's suggestion that the federal courts should decide all release questions concerning release of habeas petitioners until the matter is finally disposed of has a surface plausibility. Thus, this Court might consider an intermediate position that the federal courts should retain control of the case, including all decisions on release, but they must apply the same standards of release as the state in which the conviction occurred. It is certainly not unusual for a federal courts to apply state procedural rules in the habeas corpus area -- see e.g., Rose v. Lundy, 455 U.S. 509 (1982) dealing with the requirement of exhaustion and Wainwright v. Sykes, 433 U.S. 72 (1977) dealing with the application of state procedural default. But what federal courts cannot do is to incorporate standards of release which the state has itself rejected as a basis for handling its own criminal defendants.

Respectfully submitted,

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